NO. 15352

In the United States
Circuit Court of Appeals
For the Ninth Circuit

COUNTY OF SAN DIEGO AND THE CITY OF SAN DIEGO,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., a corporation, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., a corporation, and THE SALVATION ARMY,
Appellants,
v.
COUNTY OF SAN DIEGO,
Appellee.

REPLY BRIEF FOR APPELLANTS COUNTY OF SAN DIEGO AND THE CITY OF SAN DIEGO

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Statement with Respect to Brief for "Appellees" Charles W. Carlstrom et al

The record will show that the defendants Carlstrom et al moved to strike the answer of appellants County of San Diego and the City of San Diego. That motion was denied. (Memorandum of trial court, T. R., pp. 63 through 65, Judgment, p. 82 T. R.), and their appeal relates solely to that denial. Appellants Charles

the Government transcends constitutional limitations. Our only concession is that if the Board of Supervisors in its discretion grants a petition for cancellation with reference to property purchased by a public agency by negotiation and not by the exercise of eminent domain, the statute as construed by the California courts is constitutional. Beyond that point it is demonstrably violative both of due process and the prohibition against a gift of public property or public rights to a private party for a private purpose.

The United States, p. 11 of its brief, stated:

> "The principal argument on which the appellants rely is that Section 4986(f) was not intended to apply to condemnation cases, but only purchases on the open market. Appellants cite absolutely no authority to sustain their conjecture."

All of the cases cited by the United States compelling the cancellation relate to purchases and do not relate to condemnation proceedings. *People* v. *Board of Supervisors,* 126 C. A. 670, *City of Los Angeles* v. *Ford,* 12 Cal. 2d 407, *City of Los Angeles,* v. *Board of Supervisors,* 108 C. A. 655, all involve title acquired by purchase rather than condemnation. The United States has not cited a case where in a condemnation action the taxing agency was precluded from asserting in the court where the action was pending the validity of its tax lien. In the present case summary judgment was granted not on the basis of any claim of irregularity or invalidity of the tax lien, but instead solely on the basis of the Government's alleged arbitrary right of cancellation.

Argument in Reply to United States

A. *Government's "Mandatory" Theory of Cancellation Repudiated by the Statute Itself.*

With respect to the "mandatory vs. discretionary" aspect of the power of cancellation and the Government's resultant arbitrary rights in relation thereto, all as alleged and asserted by it, the expressed policy of the California legislature itself is to be found in Section 4986, paragraph (g), particularly in the final subparagraph thereof, reading as follows:

> "(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of this public ownership is not subject to sale for delinquent taxes.
>
> " 'Property acquired' as used in this section shall include street easements and shall also include other easements for public use where the residual estate remaining in private ownership has a nominal value only.
>
> "No cancellation under subparagraphs (b), (e), (f), or (g) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney thereof.
>
> "*No cancellation under subparagraph (g) shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, until after three years succeeding the lien date of such tax on personal property or improvements and then only if in the opinion of the county auditor and the board of supervisors the remaining real property under the assessment is not of sufficient value to secure payment of the taxes on such personal property or improvements.*" (Emphasis ours).

From this it will be noted (again directing attention to the final subparagraph above set forth with emphasis) that: (1) No cancellations shall be made at all, i.e., cancellations are positively prohibited, as to secured personal and improvements taxes less than 3 years old (computing time from lien date to time of filing

petition for cancellation); and (2) as to such improvements and personal taxes over 3 years old, cancellations are permitted only if the county auditor and the board of supervisors in the exercise of their judgment and discretion shall agree that the remaining real property under assessment is *not* sufficient in value to secure payment of such taxes.

If and when the tax on the land alone is canceled in the discretion of the county, pursuant to the section, then these uncancellable taxes on personal and improvements heretofore secured against the land, if they are less than 3 years old or if they are more than 3 years old but are nevertheless deemed uncancellable by the county taxing officials, are transferred to the unsecured roll, where they become the subject of collection by suit brought by the county, all as set forth in the following Revenue and Taxation Code sections:

> "§ 134. *'Unsecured property.'* 'Unsecured property' is property: (a) The taxes on which are not a lien on real property sufficient, in the opinion of the assessor, to secure payment of the taxes.
>
> (b) The taxes on which were secured by real estate on the lien date and which real estate was later acquired by the United States of America, the State, or by any county, city, school district or other political subdivision and the taxes canceled thereon within three years from the lien date thereof."
>
> "§ 2921.5. *Transfer of taxes from secured to unsecured roll: Collection.* Taxes on unsecured property as defined in Section 134, subparagraph (b) of this code shall be transferred fom the 'secured roll' to the 'unsecured roll' of the corresponding year by the county auditor at the same time the taxes are canceled on the real estate, and shall be collected in the same manner as other delinquent taxes on the 'unsecured roll'; provided, that no delinquent penalty shall attach to such taxes so transferred, except to those taxes which carried delinquent penalty on the secured roll at time the real estate involved was acquired by a political subdi-

vision."

"§ 3002. *Suit to collect from assessee moved to another county: Employment of attorney: Officer's liability to continue.* If an assessee of property on the unsecured roll moves to another county, the official collecting taxes on the unsecured roll in the county in which the property was assessed may employ an attorney to sue for and collect the taxes in such official's name. This does not relieve such official from any duties."

"§ 3003. *Suit for collection where lien insufficient security.* Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs."

"§ 3004. *Evidentiary effect of certified copy of entry.* In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is prima facie evidence of the plaintiff's right to recover."

"§ 3005. *Costs of service of summons: Inclusion in judgment: Deposit.* When a civil action is brought by the assessor or tax collector to recover delinquent unsecured property taxes, the sheriff, marshal, or constable shall specify, when the summons or process is returned, the costs which he would ordinarily be entitled to for such service and such costs shall be made a part of any judgment recovered by the assessor or tax collector and on payment or satisfaction of the judgment such costs shall be deposited in the county general fund."

Thus it will be seen that the legislature itself has qualified and circumscribed its statutorily conferred right to provide that there shall be no cancellations whatever for two out of the three types of taxes on the secured roll under certain conditions, but permits such cancellations under certain other conditions, all subject, however, to the judgment and discretion of the county taxing officials.

What becomes of the Government's theory of "mandatory"

cancellation under such circumstances? Unless it be that Government's theory is now relegated in its application to the third remaining type of tax on the secured roll, namely, the tax on the land alone.

As to the latter, it is submitted the more recent California cases, heretofore cited, dispose of the point. No longer is it mandatory, say these decisions, that the tax on the land, or the improvements, or the personal property secured against that land, be canceled simply because acquired after lien date by Government. Discretion is now vested in the county in these premises, for to cancel on the land might jeopardize in the individual case improvements and personal property taxes already secured against that land.

For example, if such taxes are less than 3 years old they can be transferred to the unsecured roll and be collected by suit, as heretofore explained. But if they are over 3 years old such transfer is of no avail to the county for the 3-year statute of limitations (Section 338, subparagraph (1), Code of Civil Procedure) runs against the county on such collection suit. (See *Los Angeles County* v. *Continental Corp.,* 113 Cal. App. 2d 207). In the latter case, the tax over 3 years old, the county has not exchanged or substituted remedies for the collection of its uncancellable improvements and personal taxes as in the former case, but has lost and foregone the only remedy it had, namely, its lien on the land. Hence the discretion now conferred to cancel or not to cancel in the individual case.

The facts in the instant case fit the foregoing legal principles. The lien date of the taxes here involved was Monday, March 7, 1955. Government acquired the property the following June 16, 1955. Less than 3 years after March 7, 1955, to wit, on November 4, 1955, Government petitioned the County for cancellation and was denied on January 10, 1956. Of the total sum of

$334,912.62 in taxes sought to be canceled, the amounts of taxes on land and improvements respectively, as revealed by the account numbers set forth in the County's Supplemental Answer, are as follows (there were no personal property taxes secured against the land): Land $53,414.27; Improvements $281,498.44.

From the above and foregoing it clearly appears, therefore, that of this total sum of $334,912.62, the sum of $281,498.44 in improvements taxes was not cancellable at all under express provisions of the statute, such taxes being less than 3 years old. And as to the remainder, or $53,414.27, assessed against the land, the County exercised its discretion and elected not to destroy its security for those uncancellable improvements taxes by removing entirely its land tax lien, but in the words of the statute chose rather to keep "the remaining real property under the assessment . . . of sufficient value to secure payment of the taxes on such . . . improvements," and not to resort to its alternative remedy of transfer to unsecured roll and collection by suit, all as it had the clear statutory right to do.

On this point alone the trial court's judgment cancelling all of the taxes and enjoining their collection, is palpably erroneous and in violation of the law, certainly to the extent at least of some $281,498.44 improvements taxes which are secured against the land.

It must be borne in mind that subdivision (g) of the section, particularly the final paragraph thereof, is the later amendment to the section in point of time, it having been added in 1947 (see Stats. 1947, p. 2023), as compared with subdivision (f) with its reference to the United States, which was first added in 1941 (Stats. 1941, p. 2641) and re-cast as it now appears in 1945 (Stats. 1945, 3d Extra Session 1944, p. 31, in effect May 1, 1944). And the cases upon which appellants rely, namely, *Sherman* v. *Quinn* (1948), 31 Cal. 2d 661, *Vista Irr. Dist.* v. *Bd. of Super-*

visors (1948), 32 Cal. 2d 477, and *Security First National Bank* v. *Bd. of Supervisors* (1950), 35 Cal. 2d 323, were all decided after this 1947 addition of subdivision (g).

B. *Injunction Erroneously Granted by Court Below.*

The Government attempts to distinguish *Weston Investment Co.* v. *State of California,* 31 Cal. 2d 390, and Revenue and Taxation Code, Section 3003 on the ground that cancellation was claimed before delinquency. The answer to that argument is that the tax is now delinquent and that it has not been paid. It may be true that the County in seeking to avoid harsh treatment of its citizens has not claimed by its answer the delinquent penalties which accrued in December, 1955 and April, 1956 to the unpaid 1955 taxes. The County has consistently accepted the position suggested to it by the United States and other agencies exercising the power of eminent domain, that rights are frozen as of the date of a declaration of taking or order of immediate possession. The fact that delinquency penalties have not been computed and added to the amount claimed in the answer does not alter the circumstance that the taxes are delinquent and that the California Supreme Court has held in the Weston case, a case where the property had been taken by the United States by eminent domain, that it remains an open question, unresolved by the California courts, whether an action to collect such taxes as an unsecured debt will lie. The court below has issued an injunction against such collection, an action in which the United States has no interest or concern, and which has no support in the statutes and decisions of the State of California.

C. *Discussion of California Constitution, Article IV, Section 31.*

With respect to the impact of the California Constitution, Article IV, Section 31, the United States has called attention to the case of *City of Ojai* v. *Chaffee,* 60 C. A. 2d 54.

A very recent case, *Doctors General Hospital of San Jose* v. *The County of Santa Clara,* 150 A. C. A. 52, at p. 56 summarizes the Ojai case, as follows:

> "In *City of Ojai* v. *Chaffee,* 60 Cal. App. 2d 54 [140 P. 2d 116], the court held that a statute providing for the cancellation of uncollected taxes was not in contravention of article IV, section 31 of the Constitution, because the specific public purpose was to restore the property in question to the tax rolls and make it once more a source of public revenue."

The Doctors Hospital case contains also the following informative discussion of the constitutional provision:

> "In *Estate of Stanford,* 126 Cal. 112 [54 P. 259, 58 P. 462, 45 L. R. A. 788], it was held that a retroactive release by the Legislature of the collateral inheritance tax was a void gift of public funds within the meaning of article IV, section 31, as the tax was due and payable at the death of the decedent which occurred prior to the legislative enactment. The case does not, as appellant maintains, stand for the proposition that vesting does not occur until the tax becomes due and payable. In dealing with a retroactive amendment in legislation concerned with other types of taxes, the reasoning of the Stanford case has been followed by the courts. In *People v. Schmidt,* 48 Cal. App. 2d 255 [119 P. 2d 766], it was held that the repeal of a provision of the Alcoholic Beverage Control Act could not affect the right of the people to collect the fee, as the right to collect had vested under the act before the repeal.
>
> "*Estate of Potter,* 188 Cal. 55 [204 P. 826], held that the right to the inheritance tax vested in the state at the date of the taxable transfer even though it was not due and payable until the death of the decedent. As stated by the court in *Trippet* v. *State,* 149 Cal. 521 at page 529 [86 P. 1084, 8 L. R. A. N. S. 1210], 'There is no legal inconsistency in the idea of a right being vested, although the possession may be postponed or contingent upon the performance of certain acts.'
>
> "In *City of Santa Monica* v. *Los Angeles County,* 15

Cal App. 710 [115 P. 945], the court held that property acquired by the city after the lien date but prior to the levy and assessment was not exempt from taxation as the lien attached on the first Monday in March. The court stated at page 712 that 'a lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement."

"In *San Diego County* v. *Riverside County,* 125 Cal. 495 [58 P. 81], the court held that although the right of San Diego to the payment of certain taxes assessed on railroad tracks, did not accrue until a valid assessment had been made, the right to taxes arose on the lien date, and was one of the assets of San Diego County to be prorated between San Diego County and the newly created County of Riverside. The court said at page 500: 'The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but when that has been done and the amount of taxes ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached.' Furthermore the legislative history of the 1953 statute reveals that the section providing for retroactive application was added by amendment (1953 Assembly Journal p. 1932). The assumption of the Legislature appears to have been that the property tax vests as of the March 1 lien date.

"It should be noted that the 1954 Amendment (Stats. 1955, ch. 107) to Article XIII, section 1c of the State Constitution, which was designed to liberalize the welfare exemption, is made applicable to buildings and equipment in the course of construction on or after March 1, 1954.

"The appellant further contends that even if the right to tax moneys vested on March 1 and constituted a thing of value within the purview of section 31 of article IV of the state Constitution, the Legislature could make a valid gift thereof under the public doctrine of section 1c, article XIII of the state Constitution. It is a well recognized rule that the courts will not disturb a legislative determination of what constitutes a public purpose, as long as it has reasonable basis. (*Alameda County* v. *Janssen,* 16 Cal. 2d 276 [106 P. 2d 11, 130 A. L. R. 1141]; *Shean* v. *Edmonds,* 89

Cal. App. 2d 315 [200 P. 2d 879]; *County of Los Angeles* v. *Jessup,* 11 Cal. 2d 273 [78 P. 2d 1131].) However, in the 1953 amendment there is no statement indicative of purpose, unless the urgency clause is so construed. There is no doubt that the provision for hospitals is a well recognized public purpose. However, it has been held that a county cannot provide medical treatment and care to those who can obtain and pay for such services at private hospital institutions. (*Goodall* v. *Brite,* 11 Cal. App. 2d 540 [54 P. 2d 5101].) Under the 1953 amendment the 10 per cent excess of profits over operating costs can be spent for any hospital purpose. The money could be used to provide more luxurious care in the existing facilities. Under the appellant's argument any hospital purpose is a sufficient public purpose for an appropriation of public funds. It is our view that private hospitals are exempt from taxation not because there is a public purpose within the meaning of article IV, section 31, but rather because the Legislature's power to exempt is limited to specific instances.

"In *City of Ojai* v. *Chaffee,* 60 Cal. App. 2d 54 [140 P. 2d 116], the court held that a statute providing for the cancellation of uncollected taxes was not in contravention of article IV, section 31 of the Constitution, because the specific public purpose was to restore the property in question to the tax rolls and make it once more a source of public revenue. In *Simpson* v. *City of Los Angeles,* 40 Cal. 2d 271 [253 P. 2d 464], the court upheld the surrender of unclaimed animals in the pound to private research laboratories for the specific public purpose of 'increasing knowledge relating to the cure of disease.' In *City of Oakland* v. *Garrison* (1924), 194 Cal. 298 [228 P. 433] the funds were required to be used for the paving of a certain road in the city of Oakland. Under the 1953 amendment there is no legally enforceable duty to use the 10 per cent excess profits for any specific hospital purpose. It is not enough that appellant intends to use the profits for a hospital purpose. *Cedars of Lebanon Hospital* v. *County of Los Angeles,* 35 Cal. 2d 729 [221 P. 2d 31, 15 A. L. R. 2d 1045], involved the application of the welfare exemption to various items of hospital property. In holding that the buildings under construction on tax date intended for use in housing of student nurses were not within the welfare exemption, the court

> said at p. 742, 'as above quoted, the pertinent constitutional provision (art. XIII, § 1c) and the implementing statute (Rev. & Tax. Code, § 214) unequivocally require that the property be used for the enumerated purposes. Such express limitation making *use* the focal point of consideration contemplates actual use as differentiated from an *intention* to use the property in a designated manner.' "

The Ojai case also lends support to the right of the board of supervisors to refuse cancellation in a proper case. At page 63 the court says:

> "The amicus curiae, appearing in behalf of the respondent, argues that section 4986.3 is not mandatory and hence no enforceable duty rests on respondent, basing this contention on the use of the word 'may' in the section and the definition of this word elsewhere in the Revenue and Taxation Code as being permissive. But, accepting and applying this definition, we think the discretion given thereby is vested solely in the board of supervisors, who may order the cancellation, and in the district attorney, whose consent thereto is necessary. The auditor is a mere ministerial officer, in this matter, and was doubtless specified as the officer to make the cancellation because the assessment roll is in his possession after taxes have become delinquent. (Rev. & Tax. Code, secs. 2622, 2623, 2625-2627.) When such cancellation has been properly ordered and consented to, the duty to make it rests on the auditor."

It therefore appears that while an auditor may not refuse cancellation when it has been ordered by the board of supervisors and the district attorney, there appears to be considerable support in the opinion for the position that the United States may not compel a cancellation for the sole benefit of private taxpayers and thereby make a gift of the money on deposit in the condemnation case in contravention both of the California and United States Constitutions.

It is not sufficient to avoid unconstitutionality that the gift

be to a public body and for a public purpose; it must likewise be of benefit to the county, as said in *City of Oakland* v. *Garrison,* 194 Cal. 298 at 302:

"[1] In other decisions, both prior and subsequent to the Conlin case, supra, this court has pointed out that where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift. The case of *Sinton* v. *Ashbury,* 41 Cal. 525, involved the validity of an act of the legislature directing the auditor of the city and county of San Francisco to draw his warrant against the general fund in the treasury of the city for the payment to certain commissioners of compensation for preliminary work performed by them incident to the opening and extension of certain streets within the city. This court having first determined that the legislature had power to direct and control the affairs and property of a municipal corporation for municipal purposes, then said: 'It remains only to inquire whether the appropriation in this case was for a municipal or for a purely private purpose.' The court then pointed out that the opening and extension of a principal street through a city was a matter of concern to the people of the entire municipality and concluded that the act in question was clearly valid. In *Conlin* v. *Board of Supervisors,* 114 Cal. 404 [33 L. R. A. 752, 46 Pac. 279], the first Conlin case, supra, was reviewed and construed as holding that 'the legislature holds the public moneys in trust for public purposes, and under this limitation of the constitution can make no disposal of these funds except in accordance with such purposes,' and it was further pointed out that 'even if it be conceded that the legislature has any control over municipal funds, the only circumstances under which it could direct their payment would be for some municipal purpose, or in satisfaction of some valid claim against a municipality.' In *Veterans' Welfare Board* v. *Riley,* 188 Cal. 607 [206 Pac. 631], it was said that 'The fundamental

question involved . . . is the question as to whether or not such moneys are expended for a public purpose.' A like conclusion was reached and expressed in varying terms in *Ingram* v. *Colgan,* 106 Cal. 113 [46 Am. St. Rep. 221, 28 L. R. A. 187, 38 Pac. 315, 39 Pac. 437] (payment of bounties for the destruction of coyotes); *O'Dea* v. *Cook,* 176 Cal. 659 [169 Pac. 366] (payment of police pensions); *Macmillan Company* v. *Clark,* 184 Cal. 491 [17 A. L. R. 288, 194 Pac. 1030] (furnishing free text-books), and *Allied Architects' Assn.* v. *Payne,* 192 Cal. 431 [221 Pac. 209] (expenditure for a memorial hall for the use of veteran soldiers and sailors). [2] It cannot be doubted that the proper improvement of a public street is a public purpose, and in the light of the foregoing decisions we have no difficulty in arriving at the conclusion that the appopriation here in question is not to be regarded as a gift in the sense that it is to be devoted to a private purpose as distinguished from a public one.

"[3] But this conclusion does not entirely dispose of the question raised by respondent's first contention. Section 31 of article IV of the constitution provides in effect that the legislature shall have no power to authorize the making of any gift of any public money to any *municipal corporation.* It may reasonably be concluded, and we shall assume for the purposes hereof, that this provision would prevent the appropriation of county funds to a municipal corporation even for a public purpose, if that purpose were purely municipal and of no interest or benefit to the county as a political subdivision. As was said in the second Conlin case, supra, 'While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them . . .' It is not sufficient, therefore, that the appropriation here in question be for a public purpose. It must also be for a purpose which is of interest and benefit generally to the people of the county of Alameda. The question, then, is whether the improvement of this particular street within the City of Oakland is a matter of such general county interest that the county funds may properly be expended therein."

D. Discussion of Vista Irrigation Decision.

The United States, in its discussion of *Sherman* v. *Quinn* and

Vista Irrigation District v. *Board of Supervisors* at pages 12 to 14 of its brief, overlooks the following sequence of events: *Sherman* v. *Quinn,* 31 Cal. 2d 661, was decided April 3, 1948. It holds that a veteran claiming exemption is not entitled to mandamus to compel cancellation but instead must pay his taxes under protest and sue to recover, which is an adequate remedy at law. Companion cases decided the same day include *Eisley* v. *Mohan,* 31 Cal. 2d 637, which denies mandate to compel the assessor to assess to the veteran only his possessory interest in real property purchased from the Veterans' Welfare Board. The holding is that the veteran is the owner, and that the vendor, Veterans' Welfare Board, retains its legal title as a mere security. Another case decided the same day, *Dept. of Veterans Affairs* v. *Board of Supervisors,* 31 Cal. 2d 657, denies cancellation to the department, emphasizes at page 659 the discretionary right to refuse cancellation granted to the board of supervisors by Revenue and Taxation Code, Section 4986.4. The court also cites *La Mesa etc. Irr. Dist.* v. *Hornbeck,* 216 Cal. 730 on the point that cancellation is available only where property is impressed with a public use.

All of the cases decided on that day are directed to the proposition that under the program for the purchase of housing for veterans, the veteran becomes the owner and is assessable as such even though a security legal title is retained by the Veterans' Welfare Board.

It was not until the following year, in *Vista Irrigation District* v. *Board of Supervisors,* 32 Cal. 2d 477, that the decision was made that an irrigation district, which is a public agency, could not compel cancellation by mandamus proceedings but instead was limited to the remedy of payment under protest and suit to recover. The 1948 decisions dealt with private parties. The 1949 decision applies the principles of *Sherman* v. *Quinn* to a petition filed by a governmental public agency. That such is

the character of an irrigation district, see *Anderson-Cottonwood Irrigation District v. Klukkert,* 13 Cal. 2d 191.

The two later cases cited by the United States, *Bank of America Nat. T. & S. Ass'n.* v. *Board of Supervisors,* 93 Cal. App. 2d 75, and *Oakdale Irr. Dist.* v. *County of Calaveras,* 133 Cal. App. 2d 127 are distinguishable as follows:

1. Decisions of the District Court of Appeal are of less authority than decisions of the Supreme Court.

2. The two later cases involved taxes which were void at all stages. They did not deal with taxes valid when imposed subject to later cancellation. They do not weaken the proposition that *Sherman* v. *Quinn* cited by the Supreme Court as controlling in *Vista Irrigation District* v. *Board of Supervisors* makes it the present law of California that an official agency of the State or other public agency listed in Section 4986 no longer has a right to compel cancellation of a valid tax by writ of mandate.

E. Basic Equities Are with the City and County Against the Government.

The United States concludes its brief by an attempted appeal to the equities alleged to favor the taxpayer. This argument assumes that there is something wrong in a tax system which measures the incidence of a tax as of a fixed time, noon of the first Monday in March, rather than by proration.

In the appendix to appellants' opening brief cases are cited showing that the law of California imposes local property taxes on the basis of ownership on the first Monday in March rather than for or relating to the fiscal year. These cases include *San Gabriel Valley Land and Water Co.* v. *Witmer Bros. Co.,* 96 Cal. 623, *County of San Diego* v. *County of Riverside,* 125 Cal. 495, *Rode* v. *Siebe,* 119 Cal. 518, *Grant* v. *Cornell,* 147 Cal. 565, *State* v. *Royal Consolidated Mining Co.,* 187 Cal. 343, *Bakersfield and Fresno Oil Co.* v. *Kern County,* 144 Cal. 148, *Mohawk Oil Co.* v.

Hopkins, 196 Cal. 148, *Weber* v. *County of Santa Barbara,* 15 Cal. 2d 82, *Dawson* v. *County of Los Angeles,* 15 Cal. 2d 77.

It may be noted in passing that there is a well established custom in the sale of real estate in California whereby the purchaser ordinarily agrees by contract to prorate the taxes and to assume that proportion of the tax which relates to the part of the fiscal year remaining after recordation of his deed. In the absence of such an agreement, however, the burden and obligation of paying a tax which has become a lien at the date of recordation rests with the grantor of a grant deed, (*California Civil Code,* Section 1113; *McPike* v. *Heaton,* 131 Cal. 109; *Estate of Backesto,* 63 Cal. App. 265; *Crim* v. *Umbsen,* 155 Cal. 697; *Wilcox* v. *Lattin,* 93 Cal. 588; *Grant* v. *Beronio,* 97 Cal. 498), or with a vendor who has obligated himself to convey a good title. (*Miller & Lux* v. *Sparkman,* 128 Cal. App. 449; *Parr-Richmond Industrial Corp.* v. *Boyd,* 43 Cal. 2d 157.)

With respect to payment of taxes from condemnation awards only a weak minority position suggests the propriety of either prorating or cancelling taxes which have become a valid lien. Some of these cases are referred to at page v in the Attorney General's Opinion appended to the opening brief. A few additional cases are found at 45 A. L. R. 2d 544. One of the cases in which prorating was practiced, namely, *United States* v. *Certain Lands,* 29 F. Supp. 92, was reversed on appeal (*Collector* v. *Ford Motor Co.,* 158 F. 2d 354), and the full amount of the tax ordered to be paid.

Real property taxation in California is predicated upon the duty of the assessor to ascertain the value of all property as of 12 o'clock noon on the first Monday in March. This valuation is subject to equalization by the board of supervisors sitting as a board of equalization. The amount of money necessary to be raised by taxation is determined by the board, budgetary require-

ments are fixed, and the tax is imposed. The amount of taxes levied is measured by the value as ascertained for the lien date. If the Federal Government removes from the rolls half the area of the county, there would result an irreparable deficit. The tax base is property existing on the first Monday of March, not property continuing to exist to the end of the fiscal year.

If a natural calamity such as the Long Beach earthquake of 1933 strikes a community, the only way of avoiding the tax obligation as to destroyed improvements is by constitutional amendment, as was done by California Constitution Article XIII, Section 8a. No constitutional relief has been afforded in California to the taxpayer against the comparable hazard of an eminent domain proceeding in Federal courts.

Additional authorities on the point that taxes are payable in full from condemnation awards without proration or recognizing the full and immediate impact of a legal property tax lien even though the amount of the tax may be later ascertained are the following:

U. S. v. *150.29 Acres,* 135 F. 2d 878
People v. *Palo Seco Fruit Co.,* 136 F. 2d 886

Cases demonstrating the tax obligation of the owner on the lien date include:

Helvering v. *Missouri State Life,* 78 F. 2d 778
Merchants' Bank v. *Helvering,* 84 F. 2d 478
U. S. v. *Consolidated Elevator Co.,* 141 F. 2d 791
Magruder v. *Suppler,* 316 U. S. 394.

Additional authorities establishing that the lien is transferred from the land itself to the money deposited in the registry of the court are the following:

Duckett & Co. v. *U. S.,* 266 U. S. 149
Collector v. *Ford,* 158 F. 2d 354
Washington Water Power Co. v. *U. S.,* 138 F. 2d 541
U. S. v. *150.29 Acres,* 135 F. 2d 878.

F. Unsettled Interpretations of California Statutes Should Be Clarified in California Courts.

If there should be any doubt remaining in the minds of the reviewing court concerning the law of California with respect to tax obligations and with respect to the equity of enforcing the California tax, or with respect to the discretion of the board of supervisors to grant or deny an application for cancellation, it is respectfully urged that this court follow the precedent set by the court in *U. S.* v. *150.29 Acres,* 135 F. 2d 878, where the U. S. Court, not sufficiently advised as to the law of Wisconsin, reversed the District Court and directed that proceedings therein be stayed and suspended until the United States or the other litigants should bring and prosecute to judgment appropriate proceedings in the State Court. This would insure an authoritative interpretation of the California statutes by the California courts. Cases cited by the Circuit Court of the Seventh Circuit in support of such disposition were:

City of Chicago v. *Fieldcrest Dairies,* 316 U. S. 168
Railroad Commission v. *Pullman,* 312 U. S. 496
Green v. *Phillips Petroleum Co.,* 119 F. 2d 466.

The opinion concludes:

> "This course is clearly indicated because the controversy is in its last analysis one between a taxpayer and a taxing unit of Wisconsin. It is a Wisconsin question, of primary interest to Wisconsin and its taxpayers."

Conclusion

These appellants therefore respectfully urge in conclusion:

1. That the cross appeals of Charles W. Carlstrom, Southern California Children's Aid Foundation, Inc., Southern California District Council of the Assemblies of God, Inc., and The Salvation Army are apparently abandoned and should be ordered dismissed.

2. That none of the parties has made any attempt to support the validity of Section 1252.1 of the California Code of Civil Procedure and that that part of the judgment denying the motion to strike should be affirmed.

3. That the relief granted the United States can in no event include cancellation of any portion of the taxes, and certainly not, at the very least, the $281,498.44 improvements taxes secured against the land.

4. That the United States has no interest in the money on deposit with the court and these appellants should be permitted to assert their normal rights with respect to the liens which have been transferred from the land to the deposit.

5. That with respect to the tax obligation (a) the tax should be ordered paid out of the deposit or (b) the judgment should be reversed and the parties should be instructed to seek clarification in the State courts.

6. That the County and the City should be permitted to assert without Federal impairment their rights against the money on deposit in the registry and against the taxpayers personally.

Respectfully submitted,

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